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TORT LIABILITY FOR BREACH OF STATUTORY DUTY. — Where a statute simply attaches a criminal penalty to the doing or omitting of some specified act it can hardly be said to give an individual a private right of action by implication for any injury not of the sort which it was designed to prevent.[1] And even if the injury suffered be of the very sort which the statute was designed to prevent, it would seem from the fact that the only liability provided for is a penalty recoverable by the state that the purpose expressed by the act is to protect society's interest in the public safety rather than to give individuals redress for wrongs which may be done them.[2] Accordingly, if such a statute is to enlarge the private rights of individuals, this result must be due not to mere interpretation of the statute as an expression of the legislative will, but to the common-law conception of the interrelation of public and private duties.

It was laid down broadly in the earlier cases that, as a result of the Statute of Westminster,[3] the common law gives a cause of action to any person injured as a result of the violation of a statutory duty.[4] It is now recognized, however, that the Statute of Westminster has no effect upon subsequent legislation,[5] and it is generally admitted that, where

[1] Gorris *v.* Scott, L. R. 9 Exch. 125.

[2] Mack *v.* Wright, 180 Pa. St. 472, 36 Atl. 913.

[3] STAT. WESTMINSTER II (13 Edw. I.) c. 50. This chapter was placed at the end of a series of enactments on various subjects and provided that "concerning the statutes where the law faileth, and for remedies . . . suitors . . . shall have writs provided in their cases."

[4] Couch *v.* Steele, 3 E. & B. 402; Aldrich *v.* Howard, 7 R. I. 199.

[5] See Heeney *v.* Sprague, 11 R. I. 456, 463.

there is a mere omission of a statutory duty and no affirmative illegal conduct, no action lies unless the statute was designed to prevent the kind of injury which has occurred.[6] A recent Kansas decision which adopts the broad doctrine would therefore seem to be erroneous, although the actual result reached may perhaps be justified.[7] *Stanley* v. *Atchison, Topeka, & Santa Fé Ry. Co.*, 127 Pac. 620 (Kan.).

There is, however, another almost equally sweeping doctrine which still has considerable vitality, namely, that the common law holds a man responsible for all injuries resulting from his unlawful acts.[8] This rule has been defended on the ground that the ordinary principle of non-liability for inevitable accident is based on the need of encouraging human activity; from which it logically follows that no such immunity should exist where the activity is of a sort which the law expressly discourages.[9] But apart from the necessity of encouraging activity, it is certainly inexpedient for the law to interfere to shift the burden of injury where neither party is at fault. The fault involved in violating some unimportant statute not enacted for the prevention of the kind of injury in question is not sufficient to bring about a different result. On principle, therefore, the theory of absolute liability for unlawful acts should, at any rate, be limited to breaches of the peace,[10] and to crimes involving moral turpitude.[11] The trend of modern authority is strongly in this direction.[12]

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[6] Gorris *v.* Scott, *supra;* Bischof *v.* Illinois Southern Ry. Co., 232 Ill. 446, 83 N. E. 948; Hocking Valley Ry. Co. *v.* Phillips, 81 Oh. St. 453, 91 N. E. 118.

[7] A railroad was held liable because it failed to perform its statutory duty to keep in repair a division fence between its right of way and the plaintiff's land, with the result that the plaintiff's cattle strayed away and were lost. The purpose of the statute was clearly to prevent accidents from happening on the right of way. Missouri Pacific Ry. Co. *v.* Harrelson, 44 Kan. 253, 24 Pac. 465. Nevertheless, since the statute gave the plaintiff a right to charge the expense of building the fence to the railroad company in case of its refusal to build it, the duty to build and maintain the fence would seem to have been made a duty to the plaintiff, who could therefore sue for any damage which was the natural consequence of the failure to perform it. KAN. GEN. STAT., 1909, §§ 7075–7078. The principal case is, however, opposed to the construction generally put upon similar statutes in other jurisdictions. Frisch *v.* Chicago G. W. R. Co., 95 Minn. 398, 104 N. W. 228; Hocking Valley Ry. Co. *v.* Phillips, *supra.*

[8] Owings *v.* Jones, 9 Md. 108; Salisbury *v.* Herchenroder, 106 Mass. 458; 1 STREET, FOUNDATIONS OF LEGAL LIABILITY, 173.

[9] BISHOP, NON-CONTRACT LAW, §§ 176–178; 15 HARV. L. REV. 225.

[10] The obligation to keep the peace being imposed for the benefit of the public generally, a breach of the peace should give an action to anyone injured thereby. James *v.* Campbell, 5 C. & P. 372; Vanderburgh *v.* Truax, 4 Den. (N. Y.) 464; McGee *v.* Vanover, 147 S. W. 742 (Ky.).

[11] It is by no means clear that the immorality of the defendant's act is a sufficient reason for imposing liability upon him. There seems to be some justice, however, in holding that if a defendant insists on engaging in an indefensible course of action, he rather than the person injured by his wrongful conduct should bear the burden of the injury which results therefrom. Osborne *v.* Van Dyke, 113 Ia. 557, 85 N. W. 784. See 15 HARV. L. REV. 225.

[12] The following cases are opposed to the doctrine of absolute liability for illegal action. Tingle *v.* Chicago, B. & Q. Ry. Co., 60 Ia. 333, 14 N. W. 320; Lopes *v.* Sahuque, 114 La. 1004, 38 So. 810; Bourne *v.* Whitman, 209 Mass. 155, 95 N. E. 404. See Platt *v.* Southern Photo Material Co., 4 Ga. App. 159, 163, 60 S. E. 1068, 1071. Another line of cases holding that violation of a prohibitory ordinance is only *primâ facie* evidence of negligence, although generally disapproved of, shows how strong a tendency exists to depart from the rule of absolute liability. Knupfle *v.* Knickerbocker Ice Co., 84 N. Y. 488; Hanlon *v.* South Boston Horse R. Co., 129 Mass. 310.

Where, however, the statute requires a certain standard of conduct in a case in which a duty of care existed at common law, another view is that the statute amounts to a legislative definition of due care under the circumstances in question. Although the language of a few of the cases lends some support to this contention,[13] the courts do not appear to make any distinction between cases where the statute creates a new duty and those where it merely enlarges an old one,[14] and such a distinction seems undesirable. Moreover, the legislature sometimes prohibits conduct which, though it is so often fraught with danger that it is thought to be for the public interest to forbid it, is not dangerous in every particular case. Therefore the prohibition of the conduct can hardly be regarded as a declaration by the legislature that no prudent man would engage in it under any circumstances.

It would seem, then, that the theory of tort liability for the violation of a statute is not the necessary consequence of any common-law principle. Nevertheless, as is illustrated by the law of public and private nuisance, the common law is in general as solicitous of the private as of the public interest in safety and well-being. Therefore, even though it is not necessarily true that a duty imposed for the protection of the plaintiff is a duty owed to him, the courts would seem to be justified in holding that where the legislature has recognized that a certain standard of conduct is required to safeguard the social interest in preventing some particular danger, a similar standard ought also to be maintained at common law to protect the individual interest.[15]

STATE AND NATIONAL REGULATION OF INTERSTATE AND FOREIGN COMMERCE IN INTOXICATING LIQUORS. — Although the United States Constitution gives to Congress the power to regulate interstate and foreign commerce,[1] the states, if Congress has not acted, may regulate matters as to which uniformity is unnecessary.[2] The states also seem to

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[13] Osborne *v.* McMasters, 40 Minn. 103, 41 N. W. 543; Sharkey *v.* Skilton, 83 Conn. 503, 77 Atl. 950.

[14] Whenever it is established that a statute was enacted to prevent the sort of injury which has occurred, the courts lay it down broadly that a violation of the statute, either by act or omission, is negligence. Terre Haute & I. R. Co. *v.* Voelker, 129 Ill. 540, 22 N. E. 20; Tobey *v.* Burlington, C. R. & N. Ry. Co., 94 Ia. 256, 62 N. W. 761; Leathers *v.* Blackwell Durham Tobacco Co., 144 N. C. 330, 57 S. E. 11. Moreover, this language is used in cases where the court recognizes that there was no pre-existing duty of care. See Hayes *v.* Michigan Central R. Co., 111 U. S. 228, 236, 4 Sup. Ct. 369, 372; Butz *v.* Cavanaugh, 137 Mo. 503, 511, 38 S. W. 1104, 1105.

[15] If the ground of liability be thus a duty to the plaintiff, and not a doctrine of absolute liability for the consequences of illegal conduct, it seems clear that no action should lie unless the injury be the natural result of that breach of duty and not merely a fortuitous consequence of the illegal course of action. Rich *v.* Asheville Electric Co., 152 N. C. 689, 68 S. E. 232; Bourne *v.* Whitman, *supra*. *Contra*, Iron Mountain R. Co. *v.* Dies, 98 Tenn. 655, 41 S. W. 860.

[1] U. S. Const., Art. 1, § 8.

[2] Thus the state may regulate pilotage. Cooley *v.* Board of Wardens, 12 How. (U. S.) 299. Or the qualifications of an interstate engineer. Smith *v.* Alabama, 124 U. S. 465, 8 Sup. Ct. 564.